DATUK PASAMANICKAM & ANOR.

v.

AGNES JOSEPH & ANOTHER CASE

FEDERAL COURT, KUALA LUMPUR
RAJA AZLAN SHAH CJ (MALAYA)
CHANG MIN TAT FJ
SALLEH ABAS FJ
[CIVIL APPEAL NOS. 245 & 248 OF 1979]
26 MARCH 1980

ADMINISTRATIVE LAW: *Malaysian Indian Congress Constitution - Article 15(4) - Construction of - Restriction of member's right of recourse to Court - Whether unenforceable as against public policy - Ouster of jurisdiction.*

The respondent successfully sought a declaration that the annual general meeting of the Parit Bakar Branch of the Malaysian Indian Congress held on 19 March 1979, was unconstitutional and unlawful and therefore null and void. Article 15(4) of the Malaysian Indian Congress Constitution provided that a member would *ipso facto* cease to be a member if he resorted to Court proceedings in respect of any grievance without first referring it to the Central Working Committee. The respondent had resorted to Court proceedings in breach of the above Article.

Held:

[1] The relationship between the Malaysian Indian Congress and its members was based on contract and the terms of the contract as embodied in the Malaysian Indian Congress Constitution would *prima facie* be binding on the parties.

[2] Article 15(4) of the Malaysian Indian Congress Constitution was not against public policy. It did not fetter the power of the Courts to enforce the contractual position of the parties or attempt to oust the jurisdiction of the Courts but merely made recourse to Courts subject to a condition precedent that a grievance be first referred to the Central Working Committee.

[Appeal allowed.]

Cases referred to:
Scott v. Avery 10 ER 1139
Czarnikow v. Roth, Schmidt & Co. [1922] 2 KB 478

Other sources referred to:
Halsbury's, 4th Edn., Vol. 10 para. 719, p. 326-327

For the appellants - D.P. Vijandran (M. Muthupalaniappan with him - CA No. 245679), (M. Jayasingam with him - CA No. 248/79)
For the respondent - V.C. George (H. Parjit Singh with him)

JUDGMENT

Raja Azlan Shah CJ (Malaya):

The respondent successfully sought a declaration that the annual general meeting of the Parit Bakar Branch of the Malaysian Indian Congress held on 19 March 1979 was unconstitutional and unlawful and therefore ineffective, null and void. She named the first and second appellants in Federal Court Civil Appeal No. 245/79 who were elected chairman

and secretary respectively of the branch at that meeting as the first two defendants. She also named the appellant in Federal Court Civil Appeal No. 248/79 who acted as the returning officer at the said meeting as the third defendant.

The appellants appealed against the decision of the learned Judge. We allowed the appeal and now give our reasons.

It is trite law that the relationship between the Malaysian Indian Congress (a registered society under the Societies Act) and its members is based on contract and the terms of the contract as embodied in the Malaysian Indian Congress Constitution will *prima facie* be binding on the parties. Article 15(4) of the said Constitution impliedly forbids members from resorting to Court proceedings in matters relating to their rights, obligations, duties and privileges unless and until such matters are first referred to the Central Working Committee. The said article reads as follows:

> Every member shall be bound by the decision of the Central Working Committee in matters relating to his rights, obligations, duties and privileges as a member of the Congress. If he resorts to Court proceedings in respect of his rights, obligations, duties and privileges or on behalf of any other member or in respect of the rendering or meaning of the provisions of this Constitution without first referring to the Central Working Committee or in violation of any decision or directive of the Central Working Committee, he shall *ipso facto* cease to be a member of Congress and shall not be entitled to exercise any of the rights of a member.

The only ground of appeal taken before us is that as an agreement Article 15(4) purports to oust the jurisdiction of the Courts and is consequently against public policy and void. Indeed the learned Judge held that such a provision in the rules of the Malaysian Indian Congress has the effect of ousting the jurisdiction of the Courts to hear any dispute between a member and the Congress or its office-bearers.

One of the long standing difficulties in a subject which is often difficult, is the absence in public law of any definition of an 'ouster of jurisdiction'. That has yielded much discussion and deep analysis, with comparisons being drawn from developments in other countries. The lack of clear definition may not always matter much, and in some respects insight might be thought to resemble the old quip about the elephant: easy enough to recognise, but difficult to describe. This is well indicated by the difference of opinion in the speeches of their Lordships in the House of Lords in *Scott v. Avery* 10 ER 1139 Crompton J said that he considered the agreement which came under consideration in that case a mere attempt to evade the law (p. 1131), while Coleridge J (p. 1134) took the view, which was upheld by the House of Lords, that the judgment of the Court of Exchequer stood on a safe distinction between an agreement which would close entirely the access to the Courts of law and that which only imposed a condition precedent to the appeal to them, that the parties should have first settled by an agreed mode the precise amount to be recovered. The case of *Atlantic Shipping Company v. Dreyfus* 38 Times Law Report p. 534 is another illustration of the same kind of differences of opinion, the House of Lords putting an entirely different construction upon the agreement between the parties to that which was put upon it in the Court of Appeal. In the present case Article 15(4) provides as a first step that reference to the Central Working Committee is a condition precedent before resorting to Court proceedings. The effect of this is that a member is not excluded from going to Court but must first refer the matter to the domestic forum. It has been held in *Scott v. Avery* (*supra*) that such a clause is legitimate and not contrary to public policy. The effect of the decision is that an agreement that no right of action shall arise by action in the Courts unless and until the parties' differences have been settled in some other way, for example by arbitration, is not void as being an ouster of the jurisdiction of the Courts. See also 10 *Halsbury's* (4th Edn.) 326-327, para. 719.

The principles on which the law proceeds are in our view well explained by the Court of Appeal in *Czarnikow v. Roth, Schmidt & Co.* [1922] 2 KB 478. In that case a term in a contract containing an arbitration clause provided that

> neither buyer, seller, trustee in bankruptcy, nor any other person as aforesaid shall require, any arbitrators to state in the form of a special case for the opinion of the Court any question of law arising in the reference, but such question of law shall be determined in the arbitration in manner herein directed.

Scrutton LJ said [1922] 2 KB 478, 489

> I think it is necessary to add a word about the effect of *Scott v. Avery* (*supra*). I have always understood it to be a decision that while parties cannot agree to oust the jurisdiction of the King's Courts, they can agree that no action shall be brought in those Courts till the amount of liability has been settled by arbitration. Alderson B. *Ibid.,* 1135 states this as agreed by all parties, and Lord Cranworth *Ibid.,* 1135 begins his judgment in the same way. I do not think the language of Lord Dunedin in commencing his judgment in *Atlantic Shipping Co. v. Dreyfus* (*supra*) can have been meant to impugn the first part of this proposition. The Courts always decline to recognize an agreement to refer all disputes to arbitration as compelling them to stay an action, and do so because such an agreement would oust the jurisdiction of the King's Courts. I prefer the language of Lord Sumner, concurred in by Lords Buckmaster and Atkinson, to the effect that as long as a clause does not exclude the claimant from such recourse to the Courts is always open by virtue of the provisions of the Arbitration Act, 1889, but only requires certain conditions as precedent to a valid claim, it does not oust the jurisdiction. I think that Lord Sumner would have regarded a clause depriving the claimant of the protection of the Arbitration Act as an ousting of the jurisdiction and unenforceable. And I can conceive some conditions precedent to enforcing a claim which English Courts would decline to enforce.

There are provisions in the rules of powerful organisations such as trade unions and political organisations forbidding their members, as far as they can lawfully do, from submitting their disputes to the decision of the Courts unless and until certain conditions precedent are observed, for example until certain matters have been resolved by their domestic forums, upon which they themselves agree. The present case is a case in point. There have been others before the Courts. What reason can there be for saying that there is anything contrary to public policy in allowing members to enter into such contracts? It seems to us that it would be a most inexpedient encroachment upon the liberty of the subject if he were not to be allowed to enter into such contracts. Is there anything contrary to public policy in saying that such organisations shall not be harassed by Court actions, the costs of which might be ruinous, and in which the delay in coming to a final decision disastrous? Does it not make for speedy and economical determination to refer such disputes to a domestic forum? We can see not the slightest inconvenience or denial of justice that can flow from such agreements. On the other hand, we see great advantages that may arise from them. So long as the Court's retain sufficient hold over them to prevent and redress any injustice on the part of such organisations, and to secure that their decisions are in substance made in accordance with the requirements of natural justice and not with some home made and arbitrary rules of the organisations the Courts will not interfere with their decisions. By allowing the disputes to be first decided according to the rules of the organisations Courts do not release real and effective control over them or allow them to be law unto themselves or to give them a free hand to decide disputes according to their whims and fancies. No association is outside or above the law. But so long as at the appropriate moment recourse to the Courts is available to the members, the Courts can and will safely allow the members to organise their own affairs according to the terms and tenor of their agreements, but that

appropriate moment will not have arrived until and unless the members have fully utilised their rights and privileges under such agreements. We are satisfied that Article 15(4) contains no indication of an intention to fetter the power of the Courts to enforce the contractual position of the parties. In our view it is not essentially different in character from ordinary statutory provisions limiting the time during which various procedural steps can be taken to enforce an action. Such provisions are generally speaking not designed to oust the jurisdiction of the Courts but may, at the option of the party sued, be set up to bar a remedy and correct a grievance until the grievance has been investigated in the proper forum.

We would be slow to interfere with the decision of the members of the Malaysian Indian Congress professing to act under their rules, unless it could be shown either that the rules were contrary to natural justice, or that what had been done was contrary to the rules of the association, or that there had been *mala fides* or malice in coming to a decision. It gives us great satisfaction to know that these points were not in issue before us.

Also found at [1983] 2 CLJ 126